

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**DOUGLAS R. McCARROLL,**

**Petitioner,**

**v.**

**9:08-CV-0324  
(TJM/GHL)**

**HARLEY G. LAPPIN, *et al.*,**

**Respondents.**

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**THOMAS J. McAVOY,  
Senior United States District Judge**

**DECISION & ORDER**

The instant Petition, styled as one seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241, was referred to the Hon. George H. Lowe, United States Magistrate Judge, for a Report and Recommendation. See 28 U.S.C. § 636(b); Local Rule 72.4. In the Petition, McCarroll, a federal prisoner, seeks an order barring the Federal Bureau of Prisons from taking a blood sample from him for purposes of the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135a. McCarroll claims that the taking of a blood sample would violate his Native American religious beliefs.

In an Order and Report and Recommendation dated April 4, 2008, Magistrate Judge Lowe concluded that

Petitioner's claim is more properly cast as a civil rights action under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) than as a habeas petition under 28 U.S.C. § 2241. Petitioner is challenging an allegedly unconstitutional condition of his confinement rather than the fact of his conviction or the duration of his sentence. Nelson v. Campbell, 541 U.S. 637, 643 (2004); Loparo v. Unnamed Defendants, No. 7:06-CV-0654, 2006 WL 3359586 (W.D. Va. Nov. 20, 2006).

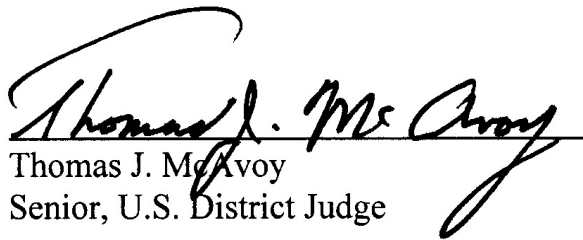
Rep. Rec. p. 2. Accordingly, Magistrate Judge Lowe recommended that the Petition be denied and dismissed “without prejudice to Petitioner filing a civil complaint setting forth the claims described in the Petition.” Id.

In his objections filed April 11, 2008, McCarroll argues that he should not be required to file a separate civil action seeking injunctive relief, but rather that his instant Petition should be construed as such a pleading. Yet, on May 19, 2008, McCarroll filed a Complaint asserting claims under Bivens and seeking, *inter alia*, the relief sought in the instant matter. See McCarroll v. Federal Bureau of Prisons, et al., 9:08-cv-00522 (N.D.N.Y).

For the reasons discussed in Magistrate Judge Lowe’s Order and Report and Recommendation dated April 4, 2008, and because the Court will not maintain two separate actions seeking the same relief, the instant Petition for a writ of habeas corpus is **DENIED** and the action is **DISMISSED**.

**IT IS SO ORDERED.**

DATED: June 26, 2008

  
Thomas J. McAvoy  
Senior, U.S. District Judge